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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-64

ROBERT E. IANNELLI, ET AL., Petitioners

v.

UNITED STATES OF AMERICA

On Certiorari from the United States Court of Appeals
for the Third Circuit

PETITIONERS' REPLY BRIEF

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INDEX

PAGE

I. The Applicability of Wharton's Rule to this Case 2

A. The Government's Narrow Exception Argument 2

B. The Government's Hypothetical Syndicate Argument 3

C. The Government's Numerical Mistake 5

D. The Rule of Lenity is Applicable Here 7

II. The Government's Procedural Argument 8

Conclusion 11

TABLE OF CITATIONS

CASES

Callinan v. United State, 364 U.S. 587 (1961) 2

Harrison v. United States, 7 F.2d 259, 263 (1925) 7

TABLE OF STATUTES

18 U.S.C. § 371 7

18 U.S.C. § 1955 ..... 3, et seq.

TABLE OF OTHER AUTHORITIES

Federal Practice and Procedure, 1 Wright, § 142, p. 311 9

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PETITIONERS' REPLY BRIEF

The Solicitor General's tardiness in filing the Government's brief in this case is exceeded only by the length and complexity of his submission.

The Government, it would appear, would have this Court either totally abrogate Wharton's Rule or completely rewrite it, or, all else failing, restrict it to cases involving dueling. We submit that Wharton's Rule is not in need of radical surgery and requires nothing more than a logical application of its plain teaching to the facts of this case.

The Government argues that Wharton's Rule does not apply to this case for a variety of reasons and alternatively suggests that if it does apply it requires only the reversal of the conspiracy convictions and sentences and not a new trial. We disagree with the Government and thus briefly reply to its arguments.

I. The Applicability of Wharton's Rule to this Case.

A. The Government's Narrow Exception Argument

At the outset of its argument, the Government concedes that this Court, while never dealing with the direct application of Wharton's Rule, has indeed acknowledged its viability. (Goverment's Brief 16) It then goes on to concede that it is on common ground with us in that Wharton's Rule applies "where it is impossible under any circumstances to commit the substantive offense without cooperative action". At this point the Government begs leave to depart from the appellants' train of thought and launches into a lengthy discussion of the nature of conspiracy and the necessity for its separate punishment. We do not quarrel with the holding in *Callanan v. United States,* 364 U.S. 587, nor any of the other multitude of cases cited by the Government to the same effect. It is obvious that Wharton's Rule has no application to the vast majority of federal criminal violations.

The Government's laborious historical analysis of Wharton's Rule in the first section of its argument concludes that many of the courts that have followed Professor Wharton's Rule have been in error and suggests that the Professor himself may not have understood his teachings as well as the Government now does. Whether courts in the past have misinterpreted Wharton's Rule may be of some slight historical interest; its application to the present case is, however, of very real moment and thus the Government in the next section of its brief attempts to come to grips with the realities of this case.

B. The Government's Hypothetical Syndicate Argument

The Government has conceded that Wharton's Rule would clearly apply in this case if it would have been impossible for the appellants to commit the substantive offense without cooperative action. Since 18 U.S.C 1955 requires the interaction of five or more persons, the Government has vaulted this statutory hurdle by an heroic leap into the land of hypothetical fantasy. While conceding at p. 11 of its brief that it would be a rare case where fewer than two persons are charged with a knowing violation of 18 U.S.C. 1955, the Government at p. 28 of its brief has devised a hypothetical gambling syndicate which it argues will permit the conviction of only one person of the substantive offense.

The Government argues that if it is possible for the substantive crime to be committed by one person then Wharton's Rule can have no application. In demonstration of this argument the Government has hypothesized a gambling syndicate made up of one professional and ten high school students who think they are involved in a market research project. The ten high school students obviously could not be charged with conspiracy, but the Government urges that the professional gambler, who was their boss, could be convicted of the substantive violation of 18 U.S.C. 1955 if the operation grossed more than two thousand dollars on a given day or was in operation for more than thirty days. While this hypothetical situation is ingenious, it is better suited to the needs of the law school classroom than to the demands of practical judicial statutory construction.

Congress enacted 18 U.S.C. 1955 to cope with problems of organized crime and syndicated gambling as it

viewed the problem in 1970. The statute was designed to deal with real gambling syndicates, not imaginary syndicates devised by the staff of the Solicitor General. The appellants here have not been convicted in a hypothetical case involving high school students who thought they were doing market research; they have been convicted and sentenced for the violation of two federal statutes which by the clear language of the statutes themselves constituted the commission of only one crime.

The Government places great weight on the theory that if the crime *could* be committed by a single person without a conspiracy, then the defendant may be convicted and sentenced for violation of the conspiracy statute and the substantive statute. (Government Brief 39) It is respectfully submitted that we are not concerned here with imaginary possibilities but with actual reality. As we indicated in our initial brief there has never been a prosecution of a single individual for a violation of 18 U.S.C. 1955 in the absence of allegations of plurality of action by less than four other co-defendants or four other con-conspirators. (Appellant's Brief 23) Plurality of action was contemplated by Congress when it enacted 18 U.S.C. 1955 and was indeed required by the very language of the statute. It is precisely this plurality of action which causes the substantive violation to merge with the conspiracy charge and thus constitute a single indictable and punishable crime.

C. The Government's Numerical Mistake

In an effort to bring this case within an exception to Wharton's Rule the Government argues that, because there were more than five persons charged in the indictment, they may be punished separately for conspiracy and the substantive offense. In support of this proposition the Government argues that Congress may have intended a greater punishment for larger combinations of illegal minds. The first thing that is wrong with this argument is that it ignores what Congress said and did. In its brief the Government points out that Section 1955 was enacted "only to deal with illegal gambling activities of major proportions". (Government Brief 29) In dealing with gambling of major proportions Congress set certain minimum standards that had to be met in order to warrant federal prosecution. Among the requisite minimums set by Congress was the requirement that it: "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such a business". Congress made a combination of five or more the key to federal prosecution. It did not, however, create any greater penalties for illegal gambling syndicates involving five or five hundred persons.

Congress set the penalty for the gambler convicted under 18 U.S.C. 1955, and the only requirement it set that is relevant to this argument is that the person convicted be a part of a group of five or more. In order to be convicted of conspiracy under 18 U.S.C. 371 there must be two or more persons who conspire. Both statutes speak in terms of minimums. Neither statute provides greater penalties for defendants convicted as participants in large gambling syndicates or in large conspiracies.

The Government argues that Wharton's Rule does not apply if "it contemplated the cooperation of a greater number of parties than were necessary to the commission of the principal offense". (Government Brief 35, 36) It then goes on to argue that the larger the combination of minds the greater the danger to society and thus, the need for greater punishment. If this were so, Congress could have easily enacted greater penalties for participants in large conspiracies and large gambling syndicates; it has not chosen to do so, and we respectfully suggest that this Court should not do so either.

The simple fallacy of the Government's numbers argument is that it fails to take into account the gist of Wharton's Rule which is set forth in the Government's brief in its original form:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, * * * cannot be maintained. * * *"
> (Government Brief 15)

18 U.S.C. 1955 requires five or more persons to be involved in an illegal gambling enterprise. In this case the jury found that eight were so involved.

Wharton's Rule speakes only of a plurality of agents; the statute in question speaks only of a plurality of five or more. Since it is evident that the plurality required by the Rule and the plurality required by the statute were both fulfilled in this case, Wharton's Rule should now apply.

D. The Rule of Lenity Is Applicable Here

The Government takes the position that, in the absence of identifiable Congressional intent, the doctrine of lenity does not apply in this case. It is quite clear that Congress has enacted far more severe penalities for the substantive violation of 18 U.S.C. 1955 than it has for a violation of 18 U.S.C. 371. It seems to us that this, in and of itself, should be a clear indication that Congress did not intend double punishment for an agreement to engage in federally impermissible gambling and the subsequent substantive involvement therein. Whatever the Government's view of lenity may be, our view is in accord with the observation made by Judge Hand in 1925:

> "Furthermore, we think it is permissible to add that in our judgment it is only in very rare cases, of which this is not one, that the cumulation of sentences is proper, where the counts are for merely alternative forms of the same offense, and where a conspiracy count is added to a count for the substantive crime. It appears to us that the maximum sentence prescribed by Congress is intended to cover the whole substantive offense in its extremest degree, no matter in how many different ways a draughtsman may plead it, and even though he add a count for conspiracy, that darling of the modern prosecutor's nursery."

Harrison v. United States, 7 F. 2d 259, 263 (1925)

Since Congress saw fit to impose more stringent penalties for a violation of 18 U.S.C. 1955 than could be imposed under the general conspiracy statute, the doctrine of lenity should apply.

II. The Government's Procedural Argument.

The Government contends that even if Wharton's Rule does apply in this case a new trial should not be granted because the Rule only prevents multiple punishment for the same offense.

The Government of course concedes that this Court has on various occasions spoken of the Rule in such fashion as to support our theory. (Government Brief 44, 45) Simply restated, our theory is that if Wharton's Rule does apply here there is no logical reason to justify submitting the conspiracy count to the jury. The Government argues that such submission is really harmless because the trial court can straighten everything out in the end. The Government also suggests that this Court and others and perhaps even Professor Wharton himself have never really understood the true nature of the Rule.

If, in fact, the application of Wharton's Rule to a charge of conspiracy and the substantive violation of 18 U.S.C. 1955 precludes dual punishment for both violations, what logical justification can there be for requiring a jury to consider the possibility of the commission of two crimes when there is only one that is punishable? The justification for such procedure can only be supported by a desire to give the prosecution an unwarranted advantage. The mischief that such a course of action can create has been commented upon: "The vice of multiplicity is that it may lead to multiple sentences for the same offense, though for this there are remedies, and that 'the prolix pleading may have some psychological effect upon the jury by suggesting to it that defendant has committed not one but several

crimes.'" I Wright, *Federal Practice and Procedure* § 142, p. 311.

It has been frequently said that the law does not require a man to do a vain thing. If that old maxim is true, why then should a jury be charged and required to deliberate on the charge of conspiracy if the conspiracy is merged with the substantive offense? To argue, as the Government does, that the trial court can ultimately set everything right is an absurdly simplistic view of criminal justice. The function of federal criminal juries is not to ponder hypothetical situations but to make determinations involving the guilt or innocence of real defendants charged with actual punishable offenses. It is respectfully submitted that the proper function of a trial court is to initially prevent the interjection of extraneous and prejudicial elements from the jury's decisional process, not to attempt in the end result to filter the poison from a needlessly adulterated decison.

The jury in this case was required to determine the guilt or innocence of eight defendants charged with two crimes when there was in fact only one. It is easy to say in retrospect that whatever harm might have resulted can now be simply corrected by a judicial adjustment of punishment. The time for judicial adjustment was before the case was submitted to the jury. The defendants here had the right to have the jury consider their case in the light of the actual punishable crimes with which they were charged and free of extraneous considerations of the separate crime of conspiracy which, under the proper application of Wharton's Rule, was not a punishable offense at all. The actual prejudice resulting from this erroneous submission to the jury is impossible to determine at this time; post-mortem investigations

for traces of poison are frequently unrewarding. The probability of prejudice in this case, however, is real indeed and can be cured by the simplest and surest of all judicial remedies: the grant of a new trial.

CONCLUSION

In spite of the Government's contentions that Wharton's Rule has in the past been misunderstood by the courts and was never really understood by its own formulator, there is still life in its logic. Professor Wharton would never have dreamed of the type of statutory scheme contemplated by 18 U.S.C. 1955 and probably the drafters of § 1955 never heard of Francis Wharton, yet his rule and § 1955 were made for each other. The collective action required by the conspiracy statute and § 1955 make the two crimes indistinguishable and thus they merge. This merger not only prohibits dual punishment for a conviction of conspiracy and the substantive offense but also prohibits submission to the jury separate counts of conspiracy and violation of § 1955.

For all of the reasons set out here and in our initial brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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